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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 735

DON A. DAVIS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Don A. Davis, petitioner, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled cause on October 15, 1945, affirming the decision of the Tax Court.

Opinion Below

The opinion of the Tax Court (R. 32) is reported in 4 T. C. 329. The opinion of the Circuit Court of Appeals (R. 51) is reported in 151 F. (2d) 441.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered October 15, 1945. The jurisdiction of this Court is

invoked under § 240(a) of the Judicial Code as amended, 28 U. S. C. A. § 347, § 350.

Questions Presented*

1. Whether (a) reasonable underwriters' commissions, and (b) reasonable registration expenses, incurred in the sale of 60,000 shares of petitioner's Western Auto Supply Company stock at a gain are deductible from his gross income as income producing expenses within the meaning of § 23(a)(2) of the Revenue Act of 1936, as amended.

2. Whether such underwriters' commissions and registration expenses incurred in increasing the marketability of petitioner's unsold 108,936 shares of Western Auto Supply Company Stock are deductible from his gross income as management expenses within the meaning of § 23(a)(2) of the Revenue Act of 1936, as amended.

Statutes and Regulations Involved

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 9-23.

Statement

The material facts as found by the Tax Court (R. 32-7) pursuant to stipulation of the parties (R. 22-7) may be summarized as follows:

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*It was in effect conceded below by the Commissioner that the issues in this cause are subject to appellate review upon the merits, no contrary contention having been urged by him in the Circuit Court of Appeals. See *Trust of Bingham* v. *Commissioner*, 325 U. S. 365 (1945).

Petitioner, the taxpayer, is an individual then resident of Mission Hills, Kansas, and he filed his Federal income tax return for the year 1937 with the Collector of Internal Revenue for the Sixth District of Missouri, Kansas City, Missouri (R. 32).

After recapitalization of Western Auto Supply Company, petitioner owned of record 168,936 shares of its new $10 par value common stock (R. 33). Petitioner could not sell his shares of Western Auto Supply Company stock to the general public through underwriters unless a registration statement were in effect under the Securities Act of 1933 (R. 33). Such a registration statement was effected covering 60,000 shares of such stock (R. 33-34) and petitioner paid $5,000.00 as his share of the registration expenses (R. 34).

In order to obtain the best possible price for his shares (R. 35), petitioner entered into an agreement to sell 60,000 of such shares through underwriters (R. 34). The underwriters sold the shares to the general public at a gain to petitioner which was included in his 1937 taxable income and petitioner paid $150,000.00 to the underwriters for their services (R. 34-36).

After sale of the 60,000 shares of such stock by the underwriters, petitioner still owned 108,936 shares of Western Auto Supply Company stock which he held for investment—to collect dividends and to realize gain upon subsequent sale (R. 35). Petitioner engaged the services of underwriters in selling the 60,000 shares to the general public, among other things, to obtain the listing of his unsold Western Auto Supply Company stock on the New York Stock Exchange (R. 36). As a result of such sale to the general public by the underwriters, petitioner's unsold

108,936 shares were listed on the New York Stock Exchange which listing increased their marketability (R. 36).

Both the underwriters' commissions and the registration expenses are reasonable in amount (R. 36).

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In failing to decide that the underwriters' commissions and registration expenses were deductible as "ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income" under §23(a)(2) of the Revenue Act of 1936, as amended.

2. In failing to decide that such underwriters' commissions and registration expenses were deductible as "ordinary and necessary expenses paid or incurred during the taxable year . . . for the management, conservation, or maintenance of property held for the production of income" under §23(a)(2) of the Revenue Act of 1936, as amended.

Reasons for Granting the Writ

1. Section 121 of the Revenue Act of 1942 by retroactive amendment of §23(a)(2) of the Revenue Act of 1936 (and of all Revenue Acts since the Revenue Act of 1913) introduced the principle of allowing as non-trade or non-business expenses in the case of individuals "all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income".

The decision of this Court in *Trust of Bingham* v. *Commissioner,* 325 U. S. 365 (1945), established that management expenses may be deducted even though such expenses were not incurred for the production of income and even though such expenses were incurred in connection with the distribution of the corpus of a trust. The decision of this Court in the *Bingham* case was rendered subsequent to the decision of the Tax Court but prior to the decision of the Circuit Court of Appeals in the instant case.

Petitioner argued in all Courts below that the expenses at bar were deductible within the meaning of §23(a)(2) of the Revenue Act of 1936 because incurred in connection with the management of property held for the production of income. Such property consisted of the 108,936 shares of Western Auto Supply Company stock retained by petitioner for the production of income (R. 25, 35), as distinguished from the 60,000 shares of Western Auto Supply Company stock sold by him. As stipulated by the parties (R. 26) and found as a fact by the Tax Court (R. 36), such expenses increased the marketability of petitioner's 108,936 shares of Western Auto Supply Company stock. Both the Tax Court and the Circuit Court of Appeals ignored petitioner's point that such expenses were properly deductible as having been incurred in connection with the management of his 108,936 shares of Western Auto Supply Company stock which he held for the production of income.

Of course, the Tax Court judge who rendered the decision in the instant case (his decision was not reviewed by the other Tax Court judges) did not have before him for his guidance the decision of this Court in the *Bingham* case. Indeed subsequent to the decision of this Court in the *Bingham* case and in a decision reviewed by all its

judges, the Tax Court has held that at least one of the expenses at bar (Securities and Exchange Commission registration fees) was so clearly deductible under §23(a)(2) as to be "too obvious to merit discussion". *W. N. Fry* v. *Commissioner,* 5 T. C. No. 130 (1945).

It seems apparent that the decisions below by denying the deductibility of the expenses as management expenses have reached a result in the case at bar which is in direct conflict with the decision of this Court in the *Bingham* case. Accordingly, we believe that the case at bar merits issuance of certiorari by this Court because of such conflict alone.

2. In addition, there is an irreconcilable conflict in the decisions of the Circuit Courts of Appeal on the issues here presented. The Ninth Circuit Court of Appeals has affirmed that reasonable expenses of "a purely capital nature" are deductible under § 23(a)(2) although such expenses prior to the enactment of that section had been "repeatedly held . . . capital expenditures and not deductible as ordinary and necessary business expenses". *Walter S. Heller* v. *Commissioner,* 2 T. C. 371, 373-4 (1943), *aff'd,* 147 F. (2d) 376 (C. C. A. 9th, 1945). On the other hand, the Eighth Circuit Court of Appeals in the instant case has ruled that the expenses at bar, having assertedly been held to be non-deductible capital expenditures prior to the enactment of § 23(a)(2), for such reason alone, cannot be deductible under that section even though incurred for the collection or production of income.

It cannot be contended that "income", in connection with which expenses are deductible under § 23(a)(2), has a narrow meaning as contemplated by Congress. The Congressional Reports of both the House and the Senate ex-

plicitly state in identical language that the term "income" as used in § 23(a)(2) "comprehends not merely income of the taxable year but also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years, and is not confined to recurring income but *applies as well to gain from the disposition of property*". [Italics supplied.] (Appendix, *infra*, pp. 17-23.)

In the circumstances, we believe that the decision below of the Eighth Circuit Court of Appeals is not in accord with the legislative history thus announced and hence is incorrect. This decision directly conflicts with the decision of the Ninth Circuit Court of Appeals in the *Heller* case.

Conclusion

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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